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No. 09-1052

APR 30 2010

In the Supreme Court of the United States

KEVIN KEITH,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS FOR THE THIRD DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, after finding new information is immaterial and would not have changed the result of a trial under *Brady v. Maryland*, 373 U.S. 83 (1963), a court commits constitutional error by also noting the verdict was supported by sufficient evidence and had been subjected to appellate review?

Whether the Ohio Court of Appeals erred in denying a Motion for New Trial filed thirteen years after the judgment and that relied upon untimely and immaterial information?

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INTRODUCTION

The Ohio Court of Appeals denied Kevin Keith's Motion for a New Trial for two reasons: first, none of Keith's "newly discovered" information was material; and second, none of it was "newly discovered." This Court should decline to grant certiorari because the Ohio court was correct on both points.

Nonetheless, Keith now argues that the Ohio Court of Appeals *relied* upon the sufficiency of the evidence to deny his *Brady v. Maryland* claim. The court did no such thing. Rather it clearly stated that the information was not "material" under Brady. It did mention, additionally, that there was sufficient evidence presented at trial, just as it mentioned that Keith's case had been exhaustively reviewed. But it never suggested that its *Brady* decision relied on either of those facts.

And the Court of Appeals correctly found that Keith could have discovered his "newly discovered evidence" long before 2007. Because he ignored those opportunities, the courts procedurally barred him from relief.

In sum, Keith's claims are meritless and stale because they rely on immaterial evidence that had been available to him for years. Accordingly, this Court should decline to grant the Petition for Certiorari.

COUNTERSTATEMENT

A. Keith was convicted and sentenced to death for murdering three people and attempting to murder three others.

Kevin Keith ended three lives—and nearly ended three more—on the night of February 13, 1994. He murdered Marichell Chatman; her four-year-old daughter Marchae; and her aunt, Linda Chatman. He also shot and wounded Marichell's two cousins, seven-year-old, Quanita, and four-year-old Quinton Reeves; and her boyfriend, Richard Warren. The Chatmans were killed merely because they were a sister, a niece, and an aunt to confidential informant Rudel Chatman. Warren and the Reeves children were shot for no other reason than their misfortune of being at the apartment.

When Keith arrived at Marichell Chatman's apartment, Marichell told Warren the man's name was "Kevin". A short time later, Keith entered the apartment, pulled out a nine-millimeter handgun from a garbage bag, and told everyone to get down on the floor. Marichell called Keith "Kevin" several times while pleading for him not to shoot. He told her to "shut up" and to stop using his name. He also said, "You should have thought of this before your brother started ratting on people." *Ohio v. Keith*, 1996 Ohio App. LEXIS 1720, *4 (Oh. Ct. App. 1996).

Keith then shot everyone in the apartment and fled the scene. Despite having been shot three times, Warren was able to stand up and run for help, but Keith noticed him and shot him again.

Eyewitness Nancy Smathers heard the gunshots, and saw a man she later identified as Keith leave the

apartment. She watched Keith get into a light-colored, mid-sized vehicle and slam into a snow bank, getting stuck for a few minutes before speeding away. The police later discovered tire prints and a partial license plate imprint of "043" from the snow bank, and were able to match the vehicle to a 1982 Oldsmobile Omega, operated by Melanie Davidson, Keith's girlfriend. *Keith*, 1996 Ohio App. LEXIS at *6.

Warren also helped identify Keith as the shooter. While recovering from surgery, Warren provided hospital staff with the name of his assailant, "Kevin," by using sign language with his father. Nurse John Steven Foor also testified that when asked who had shot him, Warren communicated the name "Kevin" to the hospital staff after his surgery. At that time, Warren had not had any contact with police, and Foor explained that he called the police to tell them about the name Warren provided. Tr. 780.

Then, during Warren's police interview, he identified Keith from a name array with 75% certainty and a photo array with 95% certainty. Warren also made an in-court identification.

Police also recovered a bullet casing outside the entrance road of the local General Electric plant, where Keith had picked up another girlfriend from work on the night of the murders. This bullet casing matched all the other casings found at the crime scene and was fired from the same weapon.

B. Keith was aware that there was another potential suspect in the crime.

To shift suspicion from himself, Keith called Rodney Melton as a witness to demonstrate that Melton also had a motive to kill Rudel Chatman or his family. Melton agreed that he owned a light-colored vehicle, similar in description to the shooter's vehicle, and that part of the license plate number for that vehicle was "043." Tr. 675. Melton acknowledged his quick arrival to the crime scene and that he already knew what type of bullets were used in the shooting before talking with police. He also appeared at the hospital a short time later to inquire about the surviving victims' conditions. Melton further admitted that he, along with Keith, was involved in the drug trafficking bust where Rudel Chatman was the police informant. Tr. 758. Melton also owned up to telling the Chatman family that the shootings likely occurred as a result of Rudel's "snitching" about the drug raid. He even testified on cross examination that he warned Chatman "to watch his back" because Chatman was suspected as the informant.

C. Keith's *Brady* claims were considered and rejected by the Ohio Court of Appeals in both a 2004 postconviction relief petition and the 2007 Motion for Leave to File a Delayed Motion for New Trial.

In 2004, Keith filed a postconviction relief petition arguing that the State had withheld exculpatory evidence related to Rodney Melton. The Ohio courts determined that the information was

immaterial. *State v. Keith*, 891 N.E.2d 1191, 1200 (Oh. Ct. App. 2008).

Keith filed a "Motion for Leave to File a Delayed Motion for New Trial" in the Crawford County Court of Common Pleas on August 1, 2007, citing to Rule 33(B) of the Ohio Rules of Criminal Procedure. Pet. App. B. He claimed he had discovered new evidence withheld by the prosecution, and he alleged that he was unable to discover this information until after the 120-day period from his trial verdict. The trial court denied the motion.

Keith appealed to Ohio's Third District Court of Appeals, which affirmed the trial court's decision. *State v. Keith*, 2008-Ohio-6187, ¶33, 2008 Ohio App. LEXIS 6187 (Oh. Ct. App. 2008), *discretionary review denied* 917 N.E.2d 811 (Ohio 2009), Pet. App. A. It agreed with the lower court that Keith's claims were procedurally barred because the information could have been discovered and raised in the 2004 petition. *Id.* at ¶29. The Court of Appeals also analyzed Keith's claims under *Brady* to determine that no *Brady* violation had occurred because the new evidence was immaterial.

Keith filed an appeal with the Ohio Supreme Court, but that court declined jurisdiction and dismissed the appeal for not presenting any substantial constitutional question. *Ohio v. Keith*, 917 N.E.2d 811 (Ohio 2009), Pet. App. C.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Keith's Petition does not deserve review from this Court because this Court can only grant relief if it *presumes* error where none exists. Most of Keith's argument is based on a fallacy: that the Ohio Court of Appeals *relied* on the sufficiency of the evidence when it denied Keith's *Brady* claim. It did not do so. This Court could only find error if it begins with the presumption that the lower court was wrong and then contorts the lower court's decision to reach that conclusion.

Moreover, Keith's "new" evidence was discoverable years ago, so his *Brady* claims are *res judicata* under Ohio law, and therefore particularly ill-suited to the untimely review Keith now seeks. But even if his claims were timely, which they are not, the "new" information was immaterial under *Brady*. The information does not contradict or exculpate Keith's guilt, and most of it is cumulative with evidence that was introduced. Its absence, then, would not have cast doubt on the fairness of Keith's trial, and it would not have changed the jury's verdict.

For all of these reasons, the State of Ohio respectfully requests this Court deny Keith's Petition for certiorari.

A. The Ohio Court of Appeals applied *Brady* correctly and found that Keith's new evidence was immaterial.

Keith's argument, like a house of cards, is only as strong as its most poorly placed card, and in Keith's case that card is untenable. The central premise of

Keith's argument is the Ohio Court of Appeals *relied* upon the sufficiency of the evidence to deny his *Brady* claim. But that simply is not so. To be sure, the Court of Appeals did *mention* the sufficiency of the evidence, but only as a passing aside *after* it had rejected Keith's *Brady* claim.

And so, while the State agrees with Keith and his *amicus curiae* that a court cannot rely solely upon the sufficiency of the evidence to deny a *Brady* claim, that point is irrelevant here.

This Court need look no further than the Court of Appeals' decision to see that it did not apply a sufficiency of the evidence test: "[Keith] has failed to establish a Brady violation, because he has failed to show that the evidence was material. . . . The trial court found, and we agree, that there is no reasonable probability that the aforementioned evidence, if disclosed, would have changed the outcome." *Keith*, 2008-Ohio-6187 at ¶¶32, 34.

A sufficiency of the evidence test looks only at the record in the light most favorable to the State; it does not, as the Ohio courts did here, consider the import of undisclosed evidence and the effect it would have had on the trial. Thus, the Court of Appeals applied the correct standard.

The Court of Appeals was not required to say anything more on the subject to meet constitutional muster. Nonetheless, in an abundance of caution, the court continued: "Furthermore, a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." *Id.* at ¶34.

But these statements are a mere coda to the main point: the withheld information was immaterial, and *additionally* the court reiterated its confidence in the verdict. The Court of Appeals can no more be said to have incorporated a sufficiency of the evidence component into *Brady* than it can to have incorporated a "test of time" and "exhaustive series of both state and federal appeals" component. It did neither.

These observations are easily recognizable *obiter dicta*. The court did not state that finding new, post-trial evidence "material" is contingent upon the sufficiency of the trial evidence presented against a defendant. And no harm occurred from the court's mention of sufficiency because the court made clear its decision to deny relief based on *Brady*, both before and at the conclusion of its analysis. *Id.* at ¶¶ 32, 34.

The Court of Appeals did not rely upon the sufficiency of the evidence. And once that card is removed, the framework of Keith's argument, and the brief of *amicus curiae* Innocence Network, tumble down.

B. Keith should not be allowed to raise claims that he could have raised years before.

Even if the Court of Appeals had misapplied a sufficiency of the evidence test—which it did not—Keith was not entitled to relief. As the Court of Appeals noted, Keith had previously raised his *Brady* argument in his 2004 postconviction relief petition. And so, Keith should have filed his Motion for New Trial when he discovered the new information; he instead waited three years to do so.

His claims, then, are *res judicata*. *Ohio v. Perry*, 226 N.E.2d 104 (Ohio 1967).

More important than the procedural bar, however, are the prudential reasons this Court should not review Keith's untimely claims. Like so many capitally-sentenced inmates, Keith has adopted a policy of delay and obfuscation. He has done nothing to refute the state courts' determinations that he *could have* discovered his new evidence during postconviction, other than arguing that it may not have been discoverable because it was the "work product" of the Ohio Pharmacy Board. But Keith presented similar *Brady* evidence in his second postconviction petition, which belies his argument that he could not have discovered the related evidence.

And just as the Melton information was not new, the "Amy Gimmits" claim has been stale since Keith's trial concluded. Whether "Amy Gimmits" ever worked at Grant Medical Center was clearly an issue that could have been determined at the time of the trial. In fact, Keith could have simply called Grant Medical Center and asked to have spoken to Nurse Amy Gimmits. But he did not do so, and his failure to do so, now sixteen years old, cannot be grounds for a new trial.

Finally, *amici curiae* for Keith argue that the eyewitness testimony in this case was unreliable. See, Brief of Memory Experts, *amici curiae*. But the time for making that claim also passed sixteen years ago. There is nothing new or recent in the concept of challenging the reliability of eyewitness testimony, and this Court should not overturn convictions

merely because a group of experts second-guess the efforts of defense counsel sixteen years after the fact.

C. None of Keith's "newly discovered evidence" is material.

Keith's claims are not only untimely, they are also meritless. Evidence must be material before it can support a *Brady* violation. *Brady*, 373 U.S. at 87. In *Kyles v. Whitley*, this Court explained that undisclosed evidence is "material" if it would have a reasonable probability of changing the outcome of the trial, had the evidence been disclosed and presented at that time. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *see also, United States v. Bagley*, 473 U.S. 667, 682 (1985). Because Keith has introduced evidence similar to his previously denied *Brady* claims, he cannot demonstrate that there is a reasonable probability that this cumulative evidence would undermine the confidence of his guilty verdict.

At the outset of its merits discussion, the state court correctly found that Keith had failed to satisfy his burden under *Brady*. *Keith*, 2008-Ohio-6187 at ¶ 32. The burden to show a *Brady* violation is greater than a "preponderance of the evidence" because "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. The Court of Appeals analyzed Keith's evidence with this standard, and it correctly determined that the evidence was immaterial because "there is no reasonable probability that the aforementioned evidence, if disclosed, would have changed the

outcome [of Keith's trial]." *Keith*, 2008-Ohio-6187 at ¶34.

Even now, Keith has yet to present new, material evidence. He has provided three pieces of "newly discovered" information since his second postconviction petition: (1) Rodney Melton told a confidential informant that he was offered $15,000 to "cripple" the police informant who reported Melton's drug trafficking ring; (2) Melton's accomplice in a pharmacy robbery ring confirmed that Melton was offered money to kill Rudel Chatman; and (3) Melton was known to wear a mask during his crimes.

1. The evidence of Rodney Melton's financial motive and mask-use were not material to Keith's trial.

The fact that Melton was offered money to kill Rudel Chatman cannot explain why someone killed everyone *except* Rudel Chatman. Indeed, killing three people and shooting three others who were not part of the offer runs *contrary* to the financial motive that Keith now claims Melton had. If anything, the evidence suggests that the murderer acted with a purely retributive purpose.

And Melton's retributive motive was well known to the jury. Melton admitted at trial that he was involved in the drug trafficking bust where Rudel Chatman was the police informant. Tr. 758. He had warned Chatman "to watch his back" because Chatman was suspected as the informant. And he told the Chatman family that the shootings likely occurred as a result of Rudel's "snitching" about the drug raid. The jury was well-aware that Melton, like Keith, had a significant motive for punishing Chatman.

As for the mask evidence, the fact that a criminal has been known to obscure his face does not exculpate other criminals that also choose to do so. Mask-usage is not a unique or unusual criminal characteristic. And so, the absence of this fact does not call into question the fairness of the trial as a whole.

2. There is no evidence of perjury in this case, nor could perjured testimony have been material.

Similarly, Keith's "false-testimony" claim fails because he cannot demonstrate the materiality of his new evidence. Keith claims that the Ohio Court of Appeals erred by not applying *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), to his "Amy Gimmits" false-testimony claim. But *Napue* and *Giglio* are inapplicable because they deal with knowingly false testimony.

In this case, there is no evidence that the detective intentionally falsified "Amy Gimmits," nor could there be. It is clear that the detective simply misspoke. *Keith v. Bobby*, 551 F.3d 555, 558 (6th Cir. 2009) (the record "shows that the detective testifying to Warren's initial identification in the hospital gave a garbled version of the name 'Amy Wishman' as the person who originally heard Warren mention Kevin Keith as the killer").

Indeed, it would have been absurd for the detective to intentionally falsify the nurse's name, or for the prosecutor to suborn perjury. First, the defense counsel could have quickly determined that "Amy Gimmits" did not work at Grant Medical Center—and thus an intentionally false statement would have been easily exposed. Second, another

nurse *actually* testified that he had heard the same thing, which would make an intentional falsehood entirely superfluous.

Morever, before addressing the perjury, "[a] finding of materiality of the evidence is required under *Brady*." *Giglio*, 405 U.S. at 154. The state court's decision to deny relief was proper precisely because the "Gimmits/Whisman" information was immaterial. *Keith*, 2008-Ohio-6187, ¶ 32, Pet. App. A. This "newly discovered evidence" does not have a reasonable probability of undermining the confidence of Keith's trial verdict because Nurse John Steven Foor testified that Warren had identified "Kevin" as the person who shot him, and that he called the police to give them that information. Tr. 777-78. And so, the existence of "Amy Gimmits" and the statement of Amy Whisman are not facts whose absence throw the fairness of the trial into doubt.

CONCLUSION

For these reasons, the Court should deny the Petition.

Respectfully submitted,

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